

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CEDRIC D. BRADLEY,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Administration,

Defendant.

NO: 12-CV-0146-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment (ECF Nos. 15, 18). Plaintiff is represented by Maureen J. Rosette. Defendant is represented by Daphne Banay. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the Court grants Defendant's motion and denies Plaintiff's motion.

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JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is limited: the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.*, at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether this standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
2 *Id.* at 1111. An error is harmless “where it is inconsequential to the [ALJ’s]
3 ultimate nondisability determination.” *Id.* at 1115 (quotation and citation omitted).
4 The party appealing the ALJ’s decision generally bears the burden of establishing
5 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

6 **FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
13 “of such severity that he is not only unable to do his previous work[,] but cannot,
14 considering his age, education, and work experience, engage in any other kind of
15 substantial gainful work which exists in the national economy.” 42 U.S.C.
16 § 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R.
19 § 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s
20 work activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in

1 “substantial gainful activity,” the Commissioner must find that the claimant is not
2 disabled. 20 C.F.R. § 416.920(b).

3 If the claimant is not engaged in substantial gainful activities, the analysis
4 proceeds to step two. At this step, the Commissioner considers the severity of the
5 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
6 “any impairment or combination of impairments which significantly limits [his or
7 her] physical or mental ability to do basic work activities,” the analysis proceeds to
8 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
9 this severity threshold, however, the Commissioner must find that the claimant is
10 not disabled. *Id.*

11 At step three, the Commissioner compares the claimant’s impairment to
12 several impairments recognized by the Commissioner to be so severe as to
13 preclude a person from engaging in substantial gainful activity. 20 C.F.R.
14 § 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
15 enumerated impairments, the Commissioner must find the claimant disabled and
16 award benefits. 20 C.F.R. § 416.920(d).

17 If the severity of the claimant’s impairment does meet or exceed the severity
18 of the enumerated impairments, the Commissioner must pause to assess the
19 claimant’s “residual functional capacity.” Residual functional capacity (“RFC”),
20 defined generally as the claimant’s ability to perform physical and mental work

1 activities on a sustained basis despite his or her limitations (20 C.F.R.
2 § 416.945(a)(1)), is relevant to both the fourth and fifth steps of the analysis.

3 At step four, the Commissioner considers whether, in view of the claimant's
4 RFC, the claimant is capable of performing work that he or she has performed in
5 the past ("past relevant work"). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
6 capable of performing past relevant work, the Commissioner must find that the
7 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
8 performing such work, the analysis proceeds to step five.

9 At step five, the Commissioner considers whether, in view of the claimant's
10 RFC, the claimant is capable of performing other work in the national economy.
11 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
12 must also consider vocational factors such as the claimant's age, education and
13 work experience. *Id.* If the claimant is capable of adjusting to other work, the
14 Commissioner must find that the claimant is not disabled. 20 C.F.R.
15 § 416.920(g)(1). If the claimant is not capable of adjusting to other work, the
16 analysis concludes with a finding that the claimant is disabled and is therefore
17 entitled to benefits. *Id.*

18 The claimant bears the burden of proof at steps one through four above.
19 *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If
20 the analysis proceeds to step five, the burden shifts to the Commissioner to

1 establish that (1) the claimant is capable of performing other work; and (2) such
2 work “exists in significant numbers in the national economy.” 20 C.F.R.
3 § 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

4 **ALJ’S FINDINGS**

5 Plaintiff applied for supplemental security income (SSI) benefits on January
6 6, 2010, alleging an onset date of November 26, 2009. Tr. 107. His claims were
7 denied initially and on reconsideration. Tr. 67-70, 75-76. Plaintiff appeared at a
8 hearing before an administrative law judge on May 4, 2011. Tr. 36-64. The ALJ
9 issued a decision on June 15, 2011, finding that Plaintiff was not disabled under
10 the Act. Tr. 20-31.

11 At step one, the ALJ found that Plaintiff had not engaged in substantial
12 gainful activity since January 6, 2010, the application date. Tr. 22. At step two,
13 the ALJ found that Plaintiff had severe impairments, but at step three the ALJ
14 found that Plaintiff did not have an impairment or combination of impairments that
15 met or equaled the listing of impairment. Tr. 22-27. The ALJ determined Plaintiff
16 had the RFC to:

17 perform light work as defined in 20 C.F.R. 416.967(b), except as
18 limited below. He can lift and carry 10 pounds frequently and lift no
19 more than 20 pounds at one time. He can stand and/or walk 2 hours at
20 a time in an 8-hour day. He can sit about 6 hours in an 8-hour day. He
can occasionally use foot controls with the left lower extremity. He
can occasionally climb ramps or stairs but never climb ladders, ropes,
scaffolds. He can occasionally balance, stoop, and crouch. He should
never kneel or crawl. He should avoid concentrated exposure to

1 extreme cold and heat, wetness or humidity, excessive vibration, and
2 irritants such as fumes, odors, dust, chemical and gases. He should
3 avoid moderate exposure to hazards such as unprotected heights and
4 use of moving machinery. He is capable of simple, routine, and
5 repetitive tasks. He is capable of occasional simple work-related
6 decision making. He is capable of occasional changes in the work
7 setting. He can work where there are no fast-paced production
8 requirements. He needs a sit/stand option.

9 Tr. 27. At step four, the ALJ found that Plaintiff was unable to perform any
10 of his past relevant work. Tr. 29. At step five the ALJ found Plaintiff could
11 perform other work existing in significant numbers in the national economy
12 in representative occupations such as a cashier II, a mail clerk, or office
13 helper. Tr. 30. Since the ALJ found that, considering Plaintiff's age,
14 education, work experience, and RFC, the Plaintiff is capable of making a
15 successful adjustment to other work that exists in significant numbers in the
16 national economy, a finding of not disabled was made. Tr. 31

17 On June 24, 2011, Plaintiff requested review by the Appeals Council
18 and submitted a one page letter from Dr. Sikora as additional medical
19 evidence. Tr. 16, 359. On February 3, 2012, the Appeals Council denied
20 Plaintiff's request for review, Tr. 1-6, making the ALJ's decision the
Commissioner's final decision that is subject to judicial review. 42 U.S.C.
§§ 405(g), 1383(c)(3); 20 C.F.R. §§ 416.1481, 422.210.

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ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying him supplemental security income under Title XVI of the Social Security Act. Plaintiff has identified two issues for review. First, he "believes that he is more limited from a physical standpoint based on his treating physician's opinion." ECF No. 16 at 9. Specifically, he contends his doctor says he meets a listed impairment. Second, Plaintiff "does not believe that the ALJ properly considered his severe psychological impairments and the limitations from there [sic]." *Id.*

DISCUSSION

A. Treating Doctor's Opinion that Plaintiff Meets Listed Impairment

Plaintiff contends that "he may have met or equaled the listing at step three of the sequential evaluation process." ECF No. 16 at 9. He contends his treating physician's letter, submitted to the Appeals Council, "should have been given controlling weight." *Id.* Dr. Sikora's letter dated June 13, 2011, states:

Please be advised that Cedric Bradley's injury to his left leg meets the medical equivalence to category 1.04A Disorders of the Spine.

Furthermore, Cedric has moderate to severe depression which is currently managed by medication.

Tr. 359.

The Ninth Circuit has recognized that the "regulations permit claimants to submit new and material evidence to the Appeals Council and require the Council

1 to consider that evidence in determining whether to review the ALJ's decision, so
2 long as the evidence relates to the period on or before the ALJ's decision.” *Brewes*
3 *v. Commissioner of Social Sec.*, 682 F.3d 1157, 1162 (9th Cir. 2012)(citing 20
4 C.F.R. § 404.970(b)).

5 A treating physician’s opinions are entitled to substantial weight in social
6 security proceedings. *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
7 (9th Cir. 2009). If a treating or examining physician’s opinion is uncontradicted,
8 an ALJ may reject it only by offering “clear and convincing reasons that are
9 supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th
10 Cir. 2005). “However, the ALJ need not accept the opinion of any physician,
11 including a treating physician, if that opinion is brief, conclusory and inadequately
12 supported by clinical findings.” *Bray*, 554 F.3d at 1228 (quotation and citation
13 omitted). “If a treating or examining doctor's opinion is contradicted by another
14 doctor's opinion, an ALJ may only reject it by providing specific and legitimate
15 reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d
16 at 1216 (citing *Lester v. Chater*, 81 F.3d 821, 830-831 (9th Cir. 1995)).

17 In this case, the Appeals Council considered and rejected the additional
18 evidence as a basis to change the ALJ’s decision, as it was entitled. Tr. 1-2;
19 *Gomez v. Chater*, 74 F.3d 967, 972 (9th Cir. 1996). To meet a listed impairment, a
20 claimant must establish that he or she meets each characteristic of a listed

1 impairment relevant to his or her claim. To equal a listed impairment, a claimant
2 must establish symptoms, signs and laboratory findings “at least equal in severity
3 and duration” to the characteristics of a relevant listed impairment, or, if a
4 claimant's impairment is not listed, then to the listed impairment “most like” the
5 claimant's impairment. *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999). To
6 be found disabled at step three, Plaintiff had to establish that he met or equaled
7 each of the following characteristics of listing 1.04A, which provides:

8 1.04 Disorders of the spine (e.g., herniated nucleus pulposus, spinal
9 arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease,
10 facet arthritis, vertebral fracture), resulting in compromise of a nerve
11 root (including the cauda equina) or the spinal cord. With:

12 A. Evidence of nerve root compression characterized by neuro-
13 anatomic distribution of pain, limitation of motion of the spine,
14 motor loss (atrophy with associated muscle weakness or muscle
15 weakness) accompanied by sensory or reflex loss and, if there is
16 involvement of the lower back, positive straight-leg raising test
17 (sitting and supine)....

18 *See* 20 C.F.R. § 404, Subpt. P, App. 1, 1.04A. Plaintiff’s argument is meritless.
19 Dr. Sikora’s medical records do not support his most recent assertion, in fact the
20 records completely contradict it. *See generally*, Tr. 255-346, 359. Dr. Sikora
referred Plaintiff for a lumbar MRI on August 4, 2010, to rule out spinal etiologies.
Tr. 306. Dr. Sikora recorded that the MRI showed “spine looks ok.” Tr. 343.
Later, Dr. Martz determined there was no neural compression at the level of his
spine and no need for surgery. Tr. 294.

1 Dr. Sikora's last minute letter contains an unsupported conclusion. The
2 ALJ's findings on the other hand are supported by substantial evidence in the
3 record.

4 **B. The ALJ's Rejection of the Opinions of Dennis R. Pollack, Ph.D.**

5 Plaintiff contends that the ALJ did not properly consider his mental
6 impairments.¹ Plaintiff contends it was error to reject Dr. Pollack's conclusion that
7 he would have moderate limitations in the ability to interact appropriately with the
8 general public. Tr. 356. He complains that Dr. Pollack further determined that he
9 would have marked limitations in the ability to perform activities within a
10 schedule, maintain regular attendance, and be punctual within customary
11 tolerances; complete a normal workday and workweek without interruptions from
12 psychologically based symptoms and to perform at a consistent pace without an

13 ¹ He also supports this argument with Dr. Sikora's letter claiming Plaintiff
14 suffered from moderate to severe depression. ECF No. 16 at 11. Curiously,
15 Plaintiff ignores however, that Dr. Sikora said his depression is "currently
16 managed by medications." Tr. 359. Impairments that can be controlled effectively
17 with medication are not disabling for the purpose of determining eligibility for SSI
18 benefits. *Warre v. Commissioner of Social Sec. Admin.*, 439 F.3d 1001, 1006 (9th
19 Cir. 2006).

1 unreasonable number and length of rest periods; and accept instructions and
2 respond appropriately to criticism from supervisors. *Id.*

3 An ALJ must provide clear and convincing reasons for rejecting the
4 uncontradicted opinion of a treating or an examining doctor. *See Lester v. Chater*,
5 81 F.3d 821, 830 (9th Cir. 1996). If the opinion of the treating or examining
6 doctor is contradicted by another doctor, the ALJ can reject the opinion by
7 providing specific and legitimate reasons supported by substantial evidence in the
8 record. *Id.*

9 The Commissioner concedes that some of the reasons given by the ALJ for
10 rejecting Dr. Pollack's opinion were in error. ECF No. 19 at 13. Yet, the
11 Commissioner argues that there were other valid reasons for rejecting Dr. Pollack's
12 opinion, such that the erroneous reasons given were harmless. *Id.*

13 The Court has reviewed the opinion of Dr. Pollack and recognizes that the
14 ALJ validly rejected his opinion for several valid reasons, the most important being
15 that it was based upon test results that were suggestive of malingering. Tr. 26, 29.
16 Dr. Pollack stated:

17 The results of the Minnesota Multiphasic Personality Inventory-2 give
18 him an exceptionally elevated F-scale at t=120. His scores suggest
19 that he was exaggerating his difficulties.... His scores are so high that
20 any interpretation of his scores should be interpreted with caution.

* * *

1 [Plaintiff] was administered the Test of Memory and Malinger.
2 His scores were very poor..... His score for Trial B suggest
malinger.

3 Tr. 351-52. While Plaintiff contests the conclusion that he was malinger,
4 “[w]hen there is conflicting medical evidence, the Secretary must determine
5 credibility and resolve the conflict.” *Thomas v. Barnhart*, 278 F.3d 947, 956-957
6 (9th Cir. 2002). A district court may not substitute its judgment for that of the
7 Commissioner. If the evidence “is susceptible to more than one rational
8 interpretation, [the court] must uphold the ALJ’s findings if they are supported by
9 inferences reasonably drawn from the record.” *Molina*, 674 F.3d at 1111.

10 The Commissioner provided at least one clear and convincing reason for
11 rejecting Dr. Pollack’s conclusions. Substantial evidence in the record supports the
12 ALJ’s findings.

13 **ACCORDINGLY, IT IS HEREBY ORDERED:**

14 1. Plaintiff’s Motion for Summary Judgment (ECF No. 15) is **DENIED**.

15 2. Defendant’s Motion for Summary Judgment (ECF No. 18) is

16 **GRANTED.**

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1 3. The hearing on cross motions for summary judgment scheduled for
2 February 10, 2014 is **VACATED**.

3 The District Court Executive is hereby directed to file this Order, enter
4 Judgment for Defendant, provide copies to counsel, and **CLOSE** this file.

5 **DATED** July 31, 2013.




THOMAS O. RICE
United States District Judge